

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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TOXICS ACTION CENTER, INC., *

et al. *

v. *

CASELLA WASTE SYSTEMS, INC. *

et al. *

* * * * *

18-cv-00393-PB
September 25, 2018
10:20 a.m.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Plaintiffs: Kevin Budris, Esq.
National Environmental Law
Center

For the Defendants: Cooley A. Arroyo, Esq.
Cleveland, Waters & Bass

Court Reporter: Deanna J. Dean, LCR, RDR, CRR
Contract Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301

1 P R O C E E D I N G S

2 THE DEPUTY CLERK: This court is in
3 session and has for consideration a motion
4 hearing in civil matter 18-cv-393-PB, Toxics
5 Action Center, Incorporated, et al. v. Casella
6 Waste Systems, Incorporated, et al.

7 THE COURT: I want to deal with the
8 standing issue first. Then I want to deal with
9 the point source issue, and then I'll deal with
10 the issue of whether the parent can be named as
11 defendant here. Okay?

12 Let's see. Mr. Irwin is on the complaint.
13 Right? Mr. Irwin?

14 THOMAS IRWIN: Yes, your Honor.

15 THE COURT: And your spouse is Lauren
16 Irwin?

17 THOMAS IRWIN: That's correct.

18 THE COURT: Okay. I just want to disclose
19 for the record Lauren Irwin is a lawyer who
20 practices employment law. She has appeared at a
21 class I teach at the Tuck School of Business to
22 speak to my class along with another lawyer
23 about employment law. She teaches a class on
24 employment law and I've agreed if she asked me
25 to speak at her class. I don't know of any

1 other relationship with her in any way.

2 I've examined the issue on my own and
3 determined that it's not a basis for me to
4 recuse myself from the matter, but I'm simply
5 noting for the parties that I have had that
6 interaction with her, completely unrelated to
7 environmental law or this case or -- and that's
8 really my sole interaction with her, other than
9 to say hello to her if I see her on the street.

10 So I'm not going to recuse myself. I'm
11 disclosing it so that anyone who has any
12 concern, if you want to try to pursue it with me
13 you can feel free to do that; but don't just sit
14 back and wait six months and then decide that
15 that's a problem for you. If it's a problem for
16 you, I need to hear about it. It isn't a
17 problem for me. I've independently determined
18 that I have no obligation to recuse myself.
19 Okay?

20 So, that said, let's go and deal with the
21 standing issue first. Who is going to speak on
22 that for the defendants?

23 MS. ARROYO: Good morning. Cooley Arroyo,
24 Cleveland, Waters & Bass, representing the
25 defendants.

1 The original motion to dismiss addressed
2 standing, but in the plaintiffs' objection, they
3 presented affidavits substantiating their
4 standing. So we're really happy to move on from
5 that particular point with the motion to dismiss
6 on that basis.

7 THE COURT: All right. Well, let me make
8 sure I understand the extent of your concession.

9 I understood you to make two standing
10 arguments, one of which you abandon in your
11 reply brief. I understood you to make an
12 associational standing argument that these
13 associations lack standing to proceed because
14 the members' individual interests weren't
15 sufficiently identified. In your reply brief,
16 you, in my mind, conceded that argument that
17 their affidavits are sufficient to satisfy that
18 aspect of the standing requirement.

19 I understood you in your reply brief to
20 press a second standing argument addressing the
21 redressability requirement of standing. If
22 you're conceding that, I'm happy to move on. If
23 you aren't, I want to hear whatever you have to
24 say about it.

25 Are you still pressing an argument that

1 there is no standing here because any injury
2 that the plaintiffs claim is not redressable
3 given the relief that they're seeking?

4 MS. ARROYO: We are maintaining that, your
5 Honor.

6 THE COURT: So whoever wants to present
7 that argument, do it.

8 MS. ARROYO: Okay. Yes, your Honor. We
9 will maintain the redressability argument.

10 Here, the plaintiffs have argued certain
11 injuries arising from North Country
12 Environmental Services, the fact that it doesn't
13 have an NPDES permit. But here, there's no
14 indication or allegation, even, that -- in the
15 complaint that an NPDES permit would redress
16 those specific injuries.

17 For example, the individuals in their
18 affidavits talked about the fact that they can't
19 go swimming, that they can't use the river
20 because of their concern for the pollution.
21 There is no --

22 THE COURT: You're saying that an NPDES
23 permit has no value in producing clean water, so
24 we shouldn't allow them to have standing? Is
25 that your position?

1 MS. ARROYO: No, I'm not saying that it
2 wouldn't --

3 THE COURT: Well, isn't it designed to
4 ensure that point source discharges of
5 pollutants are appropriately regulated? For
6 example, an NPDES permit could be denied. If I
7 wanted to pour high concentrations of mercury
8 through a pipe into the Ammonoosuc River, I
9 suspect that they would say, "No, you can't have
10 a permit to do that." Right? And I could stop
11 it altogether.

12 Isn't there a possibility that if you
13 don't do what's required here, that you would be
14 denied an NPDES permit altogether and that would
15 redress the plaintiffs' injuries which they
16 claim they're suffering because you're currently
17 disposing of pollutants into the Ammonoosuc
18 River?

19 MS. ARROYO: Well, here, your Honor, the
20 purpose of an NPDES permit is to impose
21 monitoring and reporting requirements, which are
22 already imposed --

23 THE COURT: Well, I -- and, again, I used
24 to be an environmental lawyer but that was 26
25 years ago when I was in private practice, so I'm

1 a little dated. But -- so you're saying that
2 all the NPDES permit does is it doesn't in any
3 way restrict what you can dump into a river, it
4 only requires that you disclose information
5 about what you're dumping?

6 MS. ARROYO: It oversees the -- if a party
7 subject to an NPDES permit is going to be
8 discharging pollutants, it oversees that and
9 monitors it and --

10 THE COURT: But can we deny someone who
11 wants to dump high concentrations of mercury
12 through a pipe into the Ammonoosuc River? Can
13 they say, "No, we're not going to give you an
14 NPDES permit, and you must stop it"?

15 MS. ARROYO: The regulator could decide to
16 deny an NPDES permit, correct.

17 THE COURT: Yeah. So isn't that a
18 possibility here? If you're subject to a
19 requirement that you have a permit, then there's
20 the possibility that you won't get the permit
21 without doing certain things?

22 MS. ARROYO: Well, here, the problem --

23 THE COURT: Maybe -- why don't you step
24 back and just explain to me in more general
25 terms your understanding of exactly what an

1 NPDES permit, what -- if you are under that
2 regulatory regime, what you are subjected to.
3 You seem to be suggesting it's merely an
4 informational requirement, so that you conduct
5 certain testing and that you disclose certain
6 things to the agency and perhaps the public, but
7 that there's no other regulatory engagement with
8 someone who is subject to a permit.

9 If that's what you're maintaining, could
10 you explain that to me, and if it's not, could
11 you just tell me that it's not so I can move on?

12 MS. ARROYO: My understanding is that the
13 NPDES permit is regulation by the EPA over
14 contaminants, the discharge of contaminants into
15 navigable waters, where the discharge would be
16 subject to the Clean Water Act. So, obviously,
17 we have kind of a broader question here as to
18 whether the Clean Water Act applies in this
19 instance.

20 But in addition to that, I agree, your
21 Honor, of course, that the regulator could deny
22 a permit if it saw fit; but here, where the
23 discharges of pollutants that have occurred are
24 so minor, I don't foresee such a denial
25 happening in the event that a regulator

1 determined an NPDES permit is required.

2 THE COURT: Could a regulator impose
3 conditions on an NPDES permit such as if you're
4 going to continue to discharge these, you have
5 to pretreat the discharge to reduce the level of
6 contaminants to a certain point before you
7 discharge? Is that within the regulatory
8 authority of the EPA when it considers whether
9 to issue an NPDES permit under what conditions
10 the permittee will be subjected to?

11 MS. ARROYO: Your Honor, I'm not
12 immediately familiar with what conditions the
13 EPA could enforce. I'm sure with any permit --
14 I mean, with the groundwater management permit
15 in place by the DES at this time, there are
16 conditions imposed. So I --

17 THE COURT: I guess -- here's the issue.
18 So you agree that a citizen's supervision allows
19 the citizen standing to recover penalties for
20 violations of the permit. Right?

21 MS. ARROYO: If the --

22 THE COURT: It's a form of relief. If
23 somebody has an NPDES permit and they're
24 violating the terms of that permit, a citizen
25 can sue and recover civil penalties under the

1 Clean Water Act payable to the government.

2 Right? And that's one of the kinds of relief
3 that they're seeking here, aren't they?

4 MS. ARROYO: Correct.

5 THE COURT: Okay. And they're also
6 seeking declaratory and injunctive relief here.
7 Right? Saying don't discharge without a permit,
8 and discharge only under the conditions of any
9 permit that's issued. Right?

10 MS. ARROYO: Correct.

11 THE COURT: Okay. The plaintiffs'
12 individual members want to go into the river and
13 engage with the river in ways that would expose
14 them to pollutants, and they're concerned that,
15 given the pollutants that are being discharged,
16 that they're going to be injured by engaging
17 with the water in that way. They want to stop
18 that, and one way to stop that is to require you
19 to have a permit that will either prohibit you
20 entirely from discharging because you don't --
21 you can't get a permit, or establish conditions
22 under which you can discharge pursuant to the
23 permit. Those conditions will relieve the
24 injury that they claim they're suffering and
25 that they want penalties to deter you from

1 future violations, they want injunctive relief
2 to stop you from existing violations, and
3 declaratory relief to say that you're subject to
4 the permitting requirements so you'll go get it.

5 Why aren't all of those things
6 redressable? All of the injuries that they
7 claim they're suffering are redressable through
8 declaratory relief, injunctive relief, and civil
9 penalties.

10 MS. ARROYO: I think here, your Honor,
11 this might be leading into the second point you
12 mentioned that we wanted to address today, but I
13 think it gets into the nature of what is being
14 discharged here, and it's groundwater.

15 So groundwater comes -- groundwater
16 passing under the landfill. It doesn't just
17 come out of this one location. It comes out
18 under the riverbed itself. It comes out in
19 other seeps along the riverbed.

20 THE COURT: As I understand their
21 complaint, this is not a case where they're
22 arguing that groundwater releases into the
23 Ammonoosuc River make the groundwater regulable
24 under the Clean Water Act. They're making a
25 different argument, as I understand it, which is

1 the particular discharges here are through a
2 point source and as such are regulable under the
3 Clean Water Act.

4 I see those as two distinct arguments.
5 And I want maybe the plaintiff to just tell
6 me -- I do not understand the plaintiff to
7 assert -- either plaintiff to assert that this
8 case is subject to Clean Water Act regulation
9 because groundwater is migrating into the
10 Ammonoosuc River and therefore there's a
11 hydraulic connection between the groundwater and
12 the surface water sufficient to make the
13 groundwater subject to Clean Water Act
14 regulation.

15 I didn't see this as what your complaint
16 is about. I saw your complaint as they built,
17 essentially, you would say, a canal to collect
18 seepage and discharge it through a point source
19 into the river, and that's the problem. That
20 problem requires an NPDES permit. I'm not
21 making a claim in this case at this time that
22 the groundwater itself is regulable under the
23 Clean Water Act because it's hydraulically
24 connected to the river.

25 So are you making that second argument or

1 are you confining it to the first that I --

2 MR. BUDRIS: You're correct, your Honor.
3 We're not making that second argument. This
4 case isn't about a direct hydrologic connection
5 between the landfill itself and the Ammonoosuc
6 River. The case is about discharges from the
7 stream.

8 THE COURT: If they didn't have the
9 drainage, what you -- whatever you call it --
10 because I know you guys disagree about what you
11 call it. But if you -- if they didn't have that
12 drainage canal, you wouldn't be here, because it
13 wouldn't be an argument for point source.

14 Seeps that come out of the ground
15 naturally and end up in the river are not point
16 source discharges under your theory. It's that
17 they physically altered and dredged and cleaned
18 out a pathway that you think makes that
19 regulable and subject to an NPDES permit.
20 Right?

21 MR. BUDRIS: The drainage channel is
22 certainly the key part of this case. Now, what
23 the site would look like without the drainage
24 channel, I don't know.

25 THE COURT: Yeah, but you wouldn't have

1 this complaint, and you're not asking me to like
2 it.

3 MR. BUDRIS: Yes. Yes. That is exactly
4 right.

5 THE COURT: If I were to say that -- if
6 the facts were to show you're just wrong here,
7 this is just a naturally occurring, low-lying
8 area where water naturally collects and gets out
9 there and they've done nothing to modify it, you
10 might be bringing a different complaint. But
11 you wouldn't -- that's not the theory under
12 which you're proceeding here. You would lose
13 this complaint if that's what the evidence
14 showed.

15 MR. BUDRIS: Yeah. Our --

16 THE COURT: Do you agree with that?

17 MR. BUDRIS: I do agree with that. Our
18 theory is contingent on the existence of the
19 drainage.

20 THE COURT: Right. So it's a very
21 different -- I won't ask you to concede that the
22 other kind of case could not possibly succeed,
23 but that's not the case you brought, so I don't
24 need to pay any attention to that case. And
25 this so-called circuit split and all of that is

1 completely unrelated to the case you brought.
2 The case you brought is we're digging out a
3 channel, it's a point source, and as a result it
4 has to be subject to an NPDES permit.

5 MR. BUDRIS: Yes. Exactly.

6 THE COURT: All right. Because I think
7 the issue about hydrologic connection, if the
8 groundwater is regulable as a water of the
9 United States because it is -- there's a
10 hydrologic connection, then if they are
11 depositing waste into the groundwater, that
12 could require an NPDES permit.

13 But that's not what we're talking about
14 here. That's a whole different kind of effort
15 to extend the Clean Water Act in ways that it
16 has not authoritatively been extended by the
17 Supreme Court. That's my view.

18 So I don't want to get into that problem,
19 you know. That's not what this case is about.

20 MR. BUDRIS: Neither do plaintiffs.

21 THE COURT: Okay. All right. So we're
22 clear about that. That's not what this case is
23 about. Okay? So let's focus on this particular
24 issue.

25 And so my challenge to you is, it appears

1 that their injury -- the only standing argument
2 you have left is a redressability argument. It
3 appears to me that they are seeking declaratory
4 relief, injunctive relief, and civil penalties.
5 In each case, they're seeking that relief
6 because they want to protect their interest in
7 enjoying the water -- the use of the Ammonoosuc
8 River. They also have an informational
9 argument, which I'll hear if we get to it. But
10 the principal argument is basically I want to go
11 into the river and I don't want to be exposed to
12 contaminants. The NPDES permit is not just a,
13 like, randomly imposed, let's just make --
14 impose requirements on people. It serves a
15 purpose and it's designed to protect the waters
16 of the United States. And insisting that they
17 comply with the law here is not just an
18 abstract, non-concrete injury. It will protect
19 my interest in using the waters.

20 What's your response to that?

21 MS. ARROYO: My response gets to the point
22 of what the point source is because I think that
23 kind of gets at the redressability aspect as
24 well.

25 Here in your conversation with Attorney

1 Budris that you kind of touched on that is
2 whether the channel is the point source or
3 whether the groundwater is the point source,
4 because --

5 THE COURT: So -- just understand. The
6 channel's the point source. That's what they're
7 saying. They may not be right about that.
8 That's what they're saying. That's all they're
9 saying. If they aren't right about that, they
10 lose this particular case.

11 You agree with that. Right?

12 MR. BUDRIS: Yes, your Honor.

13 THE COURT: Okay. So we're done with we
14 don't know whether this is seepage or the
15 ground. It's the channel that is collecting
16 contaminated water that is being discharged into
17 the river, and that's what the case is about and
18 it's only about that. All right? So focus on
19 that.

20 Now tell me why injury is not redressable
21 through the relief they're seeking.

22 MS. ARROYO: Because groundwater is what
23 is coming down that stream bed.

24 THE COURT: Yeah.

25 MS. ARROYO: And groundwater is also

1 coming out another --

2 THE COURT: Okay. You really want to
3 argue the second argument, which is -- you know,
4 if you don't want to say anything more about
5 redressability.

6 But I would say to you do you have any
7 doubt that if I operated a -- oh, say, a case I
8 had when I was suing a company 30 years ago, I
9 had a battery factory and along the side of the
10 river. Right? And over the years it had been
11 releasing all kinds of lead into the groundwater
12 on my property. And I'm modifying the facts
13 slightly.

14 But suppose that I drilled a well on my
15 property and pumped that lead-contaminated
16 groundwater up to the surface, and then I put a
17 pipe and I ran it through the pipe right into
18 the river. Do you have any doubt that that
19 would be subject to the requirement for an NPDES
20 permit?

21 MS. ARROYO: Not at all, your Honor.

22 THE COURT: Okay. So it doesn't matter
23 where the contamination comes from, and, in
24 fact, the Supreme Court has specifically
25 rejected the argument that the contaminant has

1 to come from the point source. It is the use of
2 the point source to transmit contaminated water,
3 wherever it comes from. So it doesn't matter.

4 And so this is the second argument. It's
5 not the first. But I -- so I'm not sure where
6 you're going with this.

7 MS. ARROYO: Your Honor, in the situation
8 you just described, if it was a circumstance
9 where an NPDES permit was required and the
10 pollution was as egregious in the example you
11 gave, I agree that the EPA could require an
12 NPDES permit and impose conditions that would
13 ameliorate the situation.

14 THE COURT: And if there was a contaminant
15 pond, and somebody drilled -- installed a
16 channel from that pond to let overflow go into
17 the river, they'd need an NPDES permit. Right?

18 MS. ARROYO: Again, yes. In a textbook
19 case like that, certainly.

20 THE COURT: Okay. So -- and the problem
21 with -- I don't know whether what they're saying
22 is right or not, but the fundamental problem I
23 have with you is you're too early in the process
24 to try to raise this. It's a quintessential
25 factual dispute. They say there -- you guys

1 dredged the channel, cleaned it out, made it
2 able to transmit contaminants into the river.
3 You say we didn't do that. That didn't happen.
4 This is naturally occurring, et cetera, et
5 cetera.

6 I don't know who's right. But at the
7 12(b)(6) stage, I have to assume that their
8 well-pleaded factual allegations are true,
9 except in very unusual circumstances that don't
10 appear to me to be present.

11 But let me first ask you to just go back
12 to the redressability argument. If you have
13 nothing more to say about it, that's fine. If
14 there is anything you want to say about it, I'll
15 hear you on it. Otherwise, I'll then ask them
16 to respond.

17 MS. ARROYO: I don't think I have anything
18 further on the redressability point.

19 THE COURT: Okay. All right.

20 So what do you want to say on the
21 redressability issue?

22 MR. BUDRIS: Your Honor, Kevin Budris on
23 behalf of plaintiffs.

24 I'd like to first and foremost point out
25 on the redressability issue that the NPDES

1 permitting program requires any permit so issued
2 to include technology-based effluent limitations
3 and water quality-based effluent limitations.

4 THE COURT: So you agree with me that an
5 NPDES permit is more than just report all the
6 bad stuff you're doing; it actually imposes
7 requirements about what you can release, how you
8 can release it, what you must do before you
9 release it as well?

10 MR. BUDRIS: Precisely, your Honor. And
11 the permits they have here don't include those
12 types of limitations. As you've mentioned, the
13 more monitoring --

14 THE COURT: You guys will -- if they're
15 required to have it, you'll get into an argument
16 with them and you may get the State involved and
17 you'll say, "Do X, Y, and Z to the water before
18 you release it," if you can release it at all.
19 And they'll say, "We don't need to do that
20 much," and then you'll come to some kind of an
21 agreement.

22 Because, you know, the problem, as you
23 know, at least based on the information that's
24 been presented to me, there's contaminated
25 groundwater. The groundwater level is above the

1 river level, and the groundwater is therefore
2 going to seep out into the river whether they
3 have an NPDES permit or not. So you want to
4 engage with them in some kind of way that -- to
5 help improve the quality of the Ammonoosuc
6 River, and you'll have a back-and-forth with
7 them about that with the drainage channel.

8 But, I mean, I suppose one response they
9 could say is, "Let's get the bulldozers out here
10 and just block that channel out completely so
11 that there's no more discharge through it, and
12 let's let the natural seepage occur." And, you
13 know, then you don't have an NPDES permit, in my
14 view. You may have some kind of very esoteric
15 argument that you do, but it doesn't seem to me
16 to have any merit.

17 But in any event, here, you've got a --
18 you made clear to me -- I don't think they
19 dispute it -- that, in fact, the regulations
20 that govern the issuance of an NPDES permit
21 impose requirements to address the contaminants
22 that are going to be released. And it is well
23 within the regulatory authority of the regulator
24 to require that certain things be done to
25 minimize discharges and pollutants.

1 MR. BUDRIS: Yes, your Honor. And those
2 requirements are precisely oriented towards the
3 type of injuries that plaintiffs' members have
4 experienced here, you know, that they don't want
5 to use the river because they're concerned about
6 what's coming out of this point source and if
7 this permitting process is geared to make sure
8 that the proper permit is set with the proper
9 limits so that people who want to use the river
10 can do so.

11 THE COURT: Okay.

12 And you also have this informational
13 argument. Did you want to say anything about
14 that?

15 MR. BUDRIS: Certainly, your Honor.

16 In addition to the effluent limitations,
17 the NPDES permitting process has certain rights
18 to public participation -- a right to submit
19 comments, a right to hearings, and, importantly,
20 any permit that's issued either have to be
21 public -- there has to be public reporting of a
22 facility's compliance or lack of compliance with
23 the effluent limitations.

24 THE COURT: They say that that information
25 is already essentially available under the state

1 permitting process for the groundwater
2 contamination at the site.

3 Is that right or wrong, in your view?

4 MR. BUDRIS: Well, some information is
5 available under the state monitoring
6 requirements. You know, they test this drainage
7 channel three times a year. And any issued
8 NPDES permit, the testing requirements are going
9 to be much higher than that, and so there would
10 be more information available. And the studies
11 that would have to be done, again to ensure that
12 the proper water quality-based effluent
13 limitations are set, would also be made
14 available to the public. So it's those pieces
15 of information that --

16 THE COURT: So your position is -- so,
17 first of all, the NPDES permit, in fact, will
18 produce changes to the releases that are
19 occurring there that will benefit your clients
20 in their engagement with the river; and, second,
21 the permitting process itself will result in the
22 disclosure of more information which will assist
23 your clients in making judgments about the
24 extent to which they want to engage in the river
25 in that area, and if they are hearing and

1 learning through the permitting process that
2 there are these contaminants, that that could
3 affect their decision about do I want to eat
4 fish from the river, do I want to swim in the
5 river, do I want to paddle in the river, and so
6 on and so forth?

7 MR. BUDRIS: Precisely, your Honor. And
8 the last kind of piece of the puzzle there, and
9 it's something that you mentioned earlier, is
10 that NPDES permit limits are enforceable by
11 citizens in citizen suits. So having an NPDES
12 permit allows them, if defendants are violating
13 permit limits in the future, to be able to sue
14 to stop those violations. They don't have that
15 type of remedy available to them now.

16 THE COURT: Okay. All right. Well, yeah,
17 they don't -- they have a limited remedy, and
18 they know there's a requirement for a permit and
19 it's not being complied with.

20 MR. BUDRIS: Yes, that's correct.

21 THE COURT: They could sue to remedy that.

22 MR. BUDRIS: Yes.

23 THE COURT: Yeah. Okay. All right.

24 Thank you.

25 Do you want to say anything else about

1 redressability? And then we'll go on to your
2 second argument if you don't.

3 MS. ARROYO: Sure. Thank you, your Honor.

4 Just to kind of tie off what we were
5 talking about a few moments ago, just to be
6 clear, there's no dispute -- I don't think
7 either party would dispute that the water in
8 that stream bed is emerging groundwater. And --

9 THE COURT: No, I'm assuming that that's
10 true.

11 MS. ARROYO: Right. And that that
12 groundwater is emerging elsewhere around and --

13 THE COURT: I'm assuming that that's true.

14 MS. ARROYO: -- inside the river.

15 So in terms of redressability, it's really
16 unclear, and the question remains, how
17 regulation of this one spot, where this fraction
18 of that groundwater is emerging from the ground
19 into the river, how remedying or monitoring with
20 an NPDES permit that one specific place would
21 ameliorate and resolve the plaintiffs' injuries
22 concerning the river as a whole.

23 THE COURT: Well, any reduction in
24 contaminants that are injurious is a benefit,
25 isn't it? That you can't completely eliminate

1 the contamination is not an argument that
2 partially eliminated contamination is beneficial
3 to the plaintiffs. And if the collection point
4 for most of the groundwater is the channel, and
5 they're required to pretreat the water before it
6 goes through the channel into the river to
7 reduce the contaminants, that provides a
8 benefit.

9 Your argument is, well, yeah, it's still
10 going to be contaminated, so why should they
11 care?

12 MS. ARROYO: Well, no. Here, it's not
13 that it's most of the groundwater entering that
14 channel, for example. It's a very small trickle
15 of several seeps in one area coming down the
16 slope into the water. So I just want to make
17 sure the description of the property is kind of
18 in our minds, because it's more diffuse than
19 that. It's not as though all of this
20 groundwater is coalescing in this one place.

21 THE COURT: Okay.

22 MS. ARROYO: So keep that in mind for the
23 remediation component.

24 THE COURT: All right. Anything else you
25 want to say on redressability?

1 MS. ARROYO: No.

2 THE COURT: Okay. Thank you. So let me
3 just rule on the standing issue.

4 The standing claim is based on Rule
5 12(b)(1). No one is arguing that I need to
6 conduct an evidentiary hearing in order to
7 resolve the standing question.

8 As initially briefed, the plaintiff
9 presented an argument that I would characterize
10 as an associational standing argument that the
11 organizations that have sued in this case lack
12 standing to sue on behalf of their members
13 because the complaint was not supported with
14 sufficient factual assertions as to the injuries
15 of individual members to justify a conclusion
16 that the associations have standing.

17 The plaintiffs responded by disclosing
18 affidavits. The defendants, to their credit,
19 abandon the issue of associational standing. So
20 I'm not going to rule on that issue in light of
21 the affidavits that were filed by the plaintiff
22 in response to the original motion.

23 There is a remaining argument. That
24 argument is that the injury here is not
25 redressable through the relief being sought. Of

1 course, to satisfy the requirements of standing,
2 there must be an injury in fact which is
3 sufficiently particularized and concrete. The
4 injury has to be traceable and it has to be
5 redressable.

6 Here, the only remaining standing argument
7 focuses exclusively on the redressability
8 component. So I'm not going to examine an
9 argument on concreteness such as the one that
10 was considered by the Supreme Court in Spokeo
11 because the defendant hasn't presented a
12 concreteness argument. Their sole argument is
13 redressability.

14 I am not persuaded by the argument that
15 the defendant -- that the defendants have
16 presented that the injury here isn't
17 redressable. Each form of relief -- declaratory
18 relief, injunctive relief, and civil
19 penalties -- are designed to encourage
20 compliance with the NPDES permitting
21 requirement. That permitting requirement is
22 valuable and directly provides benefits to the
23 plaintiff by subjecting the defendants to a
24 regulatory regime. If, in fact, they're
25 required to be subjected to that regime, that is

1 designed to address precisely the kind of
2 injuries that the plaintiffs claim that they
3 will suffer.

4 Accordingly, in my view, the relief sought
5 is redressable -- redresses the injuries that
6 are the basis for standing, and I deny the
7 motion to dismiss to the extent that it's based
8 on a lack of standing.

9 What remains is a Rule 12(b)(6) motion.
10 The principal argument that applies to both
11 defendants is an argument that the complaint is
12 not sufficient -- does not sufficiently allege
13 that the defendants are engaging in a point
14 source discharge of pollutants, and therefore
15 the complaint fails to state a viable claim for
16 relief.

17 Of course, the standard of review that I
18 use in ruling on a 12(b)(6) motion is I construe
19 the well-pleaded allegations in the complaint in
20 the light most favorable to the plaintiff. I
21 remove from the complaint any allegations that
22 are purely conclusory and ask if what remains is
23 a plausible claim to relief. If people think
24 that I should apply a different standard, please
25 tell me. Otherwise, I'll assume that you agree

1 with me that that's the standard that I'm going
2 to use. If you disagree with the standard, tell
3 me now. If not, present your argument that the
4 complaint doesn't allege a viable point source.

5 MS. ARROYO: Thank you, your Honor.

6 The focus here, as you say, is on the
7 point source, and the Clean Water Act defines a
8 point source quite clearly as a discernible,
9 confined, and discrete conveyance, and it
10 provides a non-exhaustive list of examples. And
11 those examples really kind of match the tone and
12 tenor of the hypotheticals you provided a few
13 moments ago, for example, pipes, ditches, wells,
14 things like that. You know, the cases that were
15 cited in our papers, I think, create a nice
16 dichotomy for what is a point source and what's
17 not. And while it is a case-by-case-basis
18 situation, the controlling characteristic is
19 that it is discrete. It is noticeable. It is
20 confined and identifiable.

21 THE COURT: So if there's a dried-out
22 stream bed on a piece of property that has no
23 water releases into the Ammonoosuc River --
24 completely dried out, silted in, it's no longer
25 a path for which water goes -- and you dredge

1 that dried-out stream bed so as to collect
2 seepage, and you just dredge it out and run
3 it -- it's like a ditch now. You're digging a
4 ditch in a dried-out stream bed. Is that not
5 the creation of a point source discharge?

6 MS. ARROYO: I think it would depend on
7 the kind of dredging that's done. Here, in
8 2010 --

9 THE COURT: But isn't that what they
10 essentially -- they essentially allege something
11 equivalent to that in here. And I agree with
12 you: it's a highly factually dependent issue.
13 I don't -- but I can't -- I can't fact-find
14 today. I can't know the details. I just look
15 at their complaint and say what do they say in
16 their complaint? And what they say in their
17 complaint is that you guys have taken tons of
18 material out of there and cleaned it up so that
19 it's a way of having the seepage collect and
20 discharge into the river, and that looks like a
21 canal or a ditch or the kinds of things that are
22 specifically denominated point sources.

23 And I don't know whether it's true. You
24 say it isn't. You've got a right to your day in
25 court, but you don't get a right to throw out

1 their case before we have the day in court.
2 That's why you don't use the 12(b)(6) motion to
3 address cases that are essentially
4 quintessentially factual disputes.

5 MS. ARROYO: I think, to answer your
6 question, to kind of contrast the example you
7 just gave and what the plaintiffs have said, I
8 want to contrast that with what the courts have
9 found as nonpoint source pollution because I
10 think that's more indicative of what we have
11 here.

12 Nonpoint source pollution, or pollution,
13 for example, in the Maui case that the Ninth
14 Circuit put out earlier this year, they
15 described it as arising from dispersed
16 activities over large areas not traceable to any
17 single discrete source and due to its diffuse
18 nature are very difficult to regulate through
19 individual permits.

20 THE COURT: I agree completely. That's --
21 and that's -- if they were bringing a case to me
22 that said there are these seepages that are
23 occurring at the property because the
24 contaminated groundwater is above the elevation
25 of the river, and those seepages are draining

1 into the river and they want an NPDES permit,
2 I'd be saying, boy, that's a real stretch to me.
3 It doesn't make a lot of sense to me.

4 That's why I wanted to make clear with
5 them from the very beginning, that's not the
6 case they brought. They agree if that's what's
7 all that they're alleging, they lose this case,
8 because their case is based on a different
9 theory than that. They're not conceding. I'm
10 not requiring them to concede that that couldn't
11 support a claim. But they do concede that this
12 particular complaint would have to be dismissed
13 if that's what, in fact, is all that was
14 alleged.

15 MS. ARROYO: Well, just --

16 THE COURT: So I think -- again, you keep
17 coming back and wanting to say, "It's really not
18 what they're saying it is, Judge, and what's
19 really going on there really doesn't require a
20 permit." And you may be right. But that's
21 summary judgment, you know. That's not
22 12(b)(6).

23 MS. ARROYO: Well, I think considering the
24 allegations in the complaint kind of broadly
25 within the other allegations in the complaint,

1 the point source here, if it is one, is only one
2 of many points. And, indeed, it's by pure
3 happenstance that groundwater happens to come
4 from this particular naturally occurring --

5 THE COURT: So if it were a natural
6 swale -- and this is the example I was thinking
7 of. There was a swale on the property, and
8 during certain times of the year, that swale
9 causes a discrete runoff. I think they would
10 have a very tough time arguing that that's a
11 point source discharge. But that's not what
12 they're alleging.

13 MS. ARROYO: Well, what they're --

14 THE COURT: So I agree with you. Look.
15 Those fact patterns are really interesting and
16 create really tough questions. But what they
17 said in the complaint doesn't seem real tough to
18 me.

19 MS. ARROYO: Well, I think just to
20 distinguish it from the example you gave here,
21 this is not a dried-up stream bed and that's not
22 what they've alleged in the complaint. What we
23 have here is that they're alleging that NCES
24 took action to remove deposits and clean up and
25 kind of dredge this specific area.

1 And just by way of background, the CECRA
2 mediation that happened in 2010 was just that.
3 It was a remediation. It was an esthetic
4 cleanup of this particular area. It wasn't an
5 intention to create this gully or funnel
6 pollutants to the river.

7 THE COURT: Yeah, I'm not sure that
8 intention is the standard that determines
9 whether something is or is not -- it's
10 different. But let's just -- the controlling
11 document here is the complaint, isn't it?

12 MS. ARROYO: Correct.

13 THE COURT: Okay. So let's look at what
14 they actually say about what you have done.

15 In 2010 consultants for Casella and/or
16 NCES excavated approximately 176 tons of
17 sediment containing elevated levels of iron --
18 blah, blah, blah -- from the main seep and the
19 drainage channel as part of the seep restoration
20 project. The reconstructed drainage channel was
21 designed to convey water and any pollutants
22 dissolved, suspended, or otherwise mixed in that
23 water from the main seep and from other nearby
24 seeps and wetlands to the Ammonoosuc River.
25 They then go on to allege that that's what's

1 happening there.

2 So I -- again, I can't ignore what they're
3 saying. They may be lying to me. I don't know.
4 Maybe they're just a bunch of liars. But that's
5 what they're saying. So I have to assume it's
6 true, don't I?

7 MS. ARROYO: That is the standard, your
8 Honor.

9 THE COURT: Yeah. So if I assume it's
10 true, why is that not a point source? And,
11 again, I don't know whether it's true, and it
12 may not be. And if you do some quick discovery
13 and you get back in front of me with a summary
14 judgment motion, I might have a completely
15 different take on it.

16 But the 12(b)(6) standard, if you've ever
17 gone to our CLEs -- you've heard me drone on
18 about this for 25 years -- is the least
19 effective motion in the arsenal of a defendant.
20 It almost never works. It almost always, under
21 First Circuit precedent, allows somebody to
22 amend around to address it. This is not a crazy
23 case. And it's just -- it's very hard to make
24 it work for you. I understand why people try
25 it. They want to show how tough they are, that

1 they'll fight this to the end, and they want to
2 reassure the client that they're going to come
3 after it and resist this and they want to -- but
4 it almost never works. And I'm not seeing how
5 it works here.

6 MS. ARROYO: I guess my answer to that,
7 your Honor, just going back to the standard in
8 the CWA for what a point source is is coming
9 back to that word "discrete." "Discrete"
10 suggests that it comes from only one place.

11 So, here, the alleged contaminants aren't
12 coming from one place. They're coming from
13 several places. So --

14 THE COURT: No, but it can come from one
15 place being a point source and 30 other places
16 that are not point sources. It doesn't
17 eliminate the need to have a permit for the
18 point source. Do you see what I'm saying?

19 MS. ARROYO: I do see what you're saying.

20 THE COURT: So I don't think that that
21 really cuts it for me. I mean, let me just -- I
22 would just ask my clerk, if you could run
23 upstairs for me, and I think on my desk I've
24 left some additional cases that I use. I want
25 to potentially talk about those.

1 But -- okay. So any other arguments you'd
2 like to make? And I'm happy to have a
3 free-for-all here. If Callan wants to add
4 something, he can do it. I don't care. I'd
5 rather hear the arguments. But -- so whatever
6 you'd like to tell me on this, I'd be happy to
7 hear it.

8 MS. ARROYO: Thank you.

9 I would just also point out here that
10 focusing on the -- this particular conveyance,
11 like the drainage channel or the stream bed, to
12 use your own phrase --

13 THE COURT: Yeah.

14 MS. ARROYO: -- doesn't necessarily change
15 anything about how the groundwater moves.

16 So here, again, we've got the groundwater
17 moving under the landfill, to the embankment,
18 and down the side. It doesn't really change
19 anything about that. This particular naturally
20 occurring stream bed just happens to be where a
21 few of those seeps coalesce and move down to the
22 river. That doesn't mean that there isn't --
23 you know, that these seeps don't happen
24 naturally in other locations and under the
25 riverbed itself.

1 THE COURT: Had you not cleaned it out,
2 maybe you'd be in a better position on that. I
3 mean, if what you're saying is -- your position
4 is this is naturally occurring. Right? And we
5 didn't do anything that in any way changed what
6 is naturally occurring and happening there. And
7 maybe factually you'll be right about that. But
8 they're saying, "That's absolutely not what
9 we're saying, Judge." Look at -- and I'll hear
10 them on a second on it -- but I know from having
11 read their complaint, they're saying something
12 very different, that they created a channel, in
13 effect.

14 And so that's where we are. But if either
15 of you would like to say -- unless anybody else
16 on your side wants to say anything else, I'll
17 hear from the plaintiff on it.

18 No? Okay. Thank you.

19 So, I mean, I probably previewed your
20 argument. What do you want to say?

21 MR. BUDRIS: Your Honor, I don't know that
22 we have too much to say on this point, at this
23 point in time.

24 THE COURT: You are -- I'm not
25 mischaracterizing what you're saying. You're

1 saying this is an artificially created channel
2 that collects groundwater that seeps out under
3 the surface of the property, collects it, and
4 discharges it directly into the river.

5 MR. BUDRIS: Yes. This drainage channel
6 as it exists now is a constructed transport
7 system carrying pollutants from the main seep to
8 the river.

9 THE COURT: And if it were not a
10 constructed transport system, you would have to
11 make a very different argument from the one
12 you're making to claim that it is subject to
13 NPDES regulation.

14 MR. BUDRIS: We would make a different
15 argument than what we're making. There is case
16 authority that, you know, naturally occurring
17 channels are point sources. But that's not this
18 case.

19 THE COURT: I think that's a much, much
20 tougher argument. So I --

21 MR. BUDRIS: In any event, it's not this
22 argument.

23 THE COURT: They don't have to get into
24 that, because if we do -- and maybe we will on
25 summary judgment -- you'll reserve your right.

1 But I want you to understand, I have
2 difficulty in understanding how that argument --
3 they're -- they must be regulated under the
4 State. They might be regulated under other
5 federal environmental regulations. But I don't
6 see how you get an NPDES permit out of naturally
7 occurring seeps that get into the river or a
8 naturally occurring stream bed that is
9 contaminated by groundwater on the property and
10 that runs into the Ammonoosuc. I mean, if that
11 is the case, that would explode the number of
12 people who are subject to NPDES permitting. And
13 as you well know -- and, again, I'm many years
14 from this -- but there's a carefully constructed
15 environmental regime that deal very differently
16 with point source and nonpoint source
17 pollutants. And nonpoint source pollutants are
18 regulated not exclusively but primarily by the
19 states, and Congress has made a decision that we
20 want the states to be aggressive in policing
21 nonpoint pollutant discharges.

22 And if the argument that you're not
23 presenting here, that you might try to present
24 later, I want you to understand my view is that
25 that would vastly alter that well-established

1 relationship in which we have both state
2 regulators and federal regulators. And without
3 some clear indication by Congress or the EPA
4 that that's what they're intending to have
5 happen here, you're not going to find a very
6 receptive audience in me on that. Okay?

7 MR. BUDRIS: Certainly, your Honor.

8 THE COURT: Okay.

9 MR. BUDRIS: And as to the distinction
10 between, you know, the nonpoint source pollution
11 which is regulated by the states in this EPA
12 regime regulating point sources, cases like
13 Abston are clear that you can have nonpoint
14 source pollution, but once that is gathered up
15 and can define a point source like this one --

16 THE COURT: Oh, I completely -- I
17 completely agree with that. In my example of
18 pumping out the groundwater and then releasing
19 it through a pipe, the defendants concede that
20 would require a point source discharge.

21 I don't know if Mr. Irwin was in this
22 case, but I dealt with a case 25 years ago where
23 I came out differently and perhaps wrongly about
24 dealing with transportation of one surface water
25 through a pipe into another surface water, and

1 that was at a time before some of the -- EPA had
2 provided less clarification on an issue. And I
3 still think the Supreme Court treats that as an
4 unresolved question: When you have releases of
5 surface water from one body in the United States
6 into another through a pipe or a channel or
7 something like that, does that require an NPDES
8 permit?

9 So I've dealt with this. I've been on
10 both sides of the issue. But it's a very
11 different regime for dealing with nonpoint
12 source and point source. And in order to upset
13 that regime and basically subject a vast
14 percentage of nonpoint source discharges to
15 NPDES permitting requirements, I'm going to need
16 to see some language in the statute or the
17 regulatory regime that implements the statute
18 before I would ever do that. Because I
19 understand Congress to have wanted to leave
20 certain areas to regulation to the state, and
21 where they do that, we need to -- the courts
22 need to respect that.

23 But -- so you're not making that case?

24 MR. BUDRIS: No.

25 THE COURT: What else do you want to say

1 about the case you are making?

2 MR. BUDRIS: Your Honor, I don't think
3 that we really have anything else to say here.
4 We have a constructed ditch that's discharging
5 pollutants into the Ammonoosuc River. This
6 ditch is a point source. The materials that it
7 is discharging, including contaminant
8 groundwater, are pollutants. Multiple courts
9 have recognized that contaminated groundwater is
10 a pollutant under the Clean Water Act. And
11 you've got A; you've got B; you've got C here,
12 which is a Clean Water Act violation.

13 THE COURT: Now you need to see whether
14 the facts support what you're saying. But
15 that's not for today.

16 Did you want to respond to anything else
17 on this point?

18 MS. ARROYO: Yes, I do, your Honor.

19 Your Honor, I would just note if the
20 allegation here was that there was no
21 preexisting groundwater at this particular
22 stream bed and that there was no preexisting
23 channel before the 2010 restoration project,
24 then, yes, I think we would have a problem on
25 our hands. But that's not what the case is

1 here.

2 And the complaint itself at paragraph 42
3 describes the 2010 project as a restoration
4 project. It was an effort to restore the seep
5 to what it looked like before, to return it to
6 its natural state. I mean, that's the name of
7 it: It's the SEEP Restoration Project.

8 So constructing this as --

9 THE COURT: So you'd put this in the "no
10 good deed goes unpunished" category. Right? I
11 mean, here we are trying to restore, and we're
12 now being attacked for trying to restore.

13 Maybe you're right. I don't know.

14 But -- okay. So I get your point. You're
15 saying these things were occurring naturally.
16 Even if we did restore it to its natural state,
17 that's not sufficient.

18 MS. ARROYO: Correct. And here, too,
19 there's no allegation that polluted groundwater,
20 to the extent that it exists, travels any
21 differently after that restoration, that
22 anything that was done to that channel in 2010
23 changed what it was like in its natural state
24 before that.

25 So to the extent that the argument is that

1 the construction in 2010 somehow altered the
2 nature of that natural state and transformed it
3 into a CWA point source, the facts aren't
4 there -- aren't alleged in the complaint -- the
5 allegations. Excuse me. They're not facts yet.
6 The allegations aren't there in the complaint to
7 show how that actually somehow changed the
8 nature of this to convert it into a point
9 source.

10 And, you know, just, I think we touched on
11 it, but just to kind of add additional comfort,
12 nothing in the defendants' motion here is
13 intended to suggest that NCES should operate a
14 landfill without supervision. That's not the
15 case. The groundwater has been monitored at
16 this site for decades at this point. The
17 restoration project was done at NHDES's
18 suggestion and request, and it was coordinated
19 and collaborated with the local regulator to do
20 that work.

21 So, here, we have a very closely monitored
22 site that is only different because DES asked us
23 to make it different to restore the -- this
24 particular location to its natural state.

25 THE COURT: All right. Thank you.

1 So this particular issue is really --
2 turns on the standard of review that I have to
3 apply in examining the defendants' argument. As
4 I noted, this is a 12(b)(6) motion. I have to
5 construe the allegations in the complaint in the
6 light most favorable to the plaintiff. Even
7 when I strip out conclusory allegations, it
8 appears to me that there's sufficient facts
9 alleged when construed in the light most
10 favorable to the plaintiff to support a
11 plausible claim that this is, in fact, a point
12 source, and there are no other challenges to the
13 viability of the claim other than that.

14 The defendant raises a number of good
15 arguments, and I think there are factual issues
16 that might well cause the case to tip in the
17 defendants' favor. I don't need to reach those
18 very fact-specific arguments today and I don't
19 do so. I merely determine that, as alleged in
20 the complaint, there's sufficient facts under
21 the 12(b)(6) standard to support a plausible
22 claim that this is a point source subject to the
23 NPDES permitting requirements.

24 Accordingly, I deny the defendants' motion
25 to dismiss to the extent it is based on the

1 assertion that the plaintiff has pleaded
2 insufficient facts to support a claim that this
3 is a point source discharge that must be subject
4 to the NPDES permitting regime.

5 That leaves only the argument, as I
6 understand it, that Casella should not be named
7 as a defendant in this action. And I think on
8 this one it makes sense for me to engage with
9 the plaintiffs first and then to give you a
10 chance to respond. Okay?

11 So let me ask you a couple of questions
12 first. You are not presenting a veil-piercing
13 theory of liability. Am I right?

14 MR. BUDRIS: You are right. We are not.

15 THE COURT: So I'm going to look at it
16 totally as an argument that they are a person
17 named as a person under the Clean Water Act that
18 can be subject to liability based on its own
19 actions, not based in any way on the actions of
20 its subsidiary.

21 MR. BUDRIS: That is correct.

22 THE COURT: Okay. So just explain to
23 me -- I mean, let me ask a practical question.
24 Why do you care? The owner is the sub. Right?
25 The owner of the property. The owner of the

1 sub is -- the sub is a viable entity. It's not
2 going to disappear. What you want here is to
3 engage with the owner and get the owner to do it
4 the right way. Why do you need Casella in here
5 at all?

6 MR. BUDRIS: Well, your Honor, the Clean
7 Water Act imposes liability against owners and
8 operators, and there are facts alleged in our
9 complaint and the facts that we've come upon
10 show that Casella, the parent, is intimately
11 involved here.

12 THE COURT: So RCRA and CERCLA
13 specifically and expressly impose liability on
14 owners and operators.

15 Does the Clean Water -- I thought it used
16 the term "person" and I didn't think the
17 definition of "person" expressly incorporated
18 the owner-operator language. I haven't gone
19 back to look. But does the Clean Water Act
20 expressly use the term "owner" or "operator" in
21 the same way that RCRA and CERCLA do?

22 MR. BUDRIS: My apologies, your Honor. It
23 uses the term "person."

24 THE COURT: "Person."

25 MR. BUDRIS: But the case law here is

1 clear that that person can come in the form of
2 an owner and operator.

3 THE COURT: I agree with you that if the
4 owner -- Casella was the owner, and the owner
5 engaged in a contract with Acme Corporation, and
6 the contract with Acme is you will operate this
7 site for us and deal with all of those issues
8 associated with this, and, you know, we'll pay
9 you a million dollars a year, that Acme could be
10 held liable even though it was not an owner.
11 Right? And I don't know that the defendants
12 would disagree with me on that.

13 The problem here is that you do not allege
14 any kind of contract or express engagement.
15 What you allege in terms of -- in the complaint,
16 and I may be not doing complete justice to it,
17 but you allege that they play a direct role in
18 managing and funding the landfill's operation
19 and pollution controls activities, including the
20 maintenance and operation of the drainage
21 channel. And then you provide a more specific
22 allegation: "Casella personnel regularly
23 communicate with staff at the New Hampshire
24 Department of Environmental Services regarding
25 pollution control, including groundwater and

1 surface water monitoring of the landfill.
2 Casella personnel also work with third-party
3 contractors and consultants to prepare water
4 quality monitoring results."

5 Do you have -- you make an allegation
6 about maintenance and operation, but you don't
7 provide a lot more specifics than that, other
8 than communicating with staff and overseeing the
9 monitoring activities. Is that the sum total of
10 what it is you allege that they do here?

11 MR. BUDRIS: Well, your Honor, it's
12 Casella -- it's Casella staff communicating with
13 staff at DES.

14 THE COURT: Right.

15 MR. BUDRIS: So there's that. And as you
16 mentioned --

17 THE COURT: But wouldn't the parent have a
18 natural interest in knowing about whether its
19 sub is violating the law in ways that could
20 suppose the sub to damages which could affect
21 the parent's financial interest as the sole
22 owner of the sub?

23 So I'm not sure that that alone is going
24 to be enough to --

25 MR. BUDRIS: Well, your Honor, there's a

1 difference between the parent keeping itself
2 apprised of the communications as opposed to the
3 parent itself being the one that's interacting
4 with DES on the day-to-day about what's going on
5 with the drainage channel and --

6 THE COURT: Do you have any belief that
7 they're doing anything other than that,
8 providing information, reviewing reports, and
9 telling the sub, you know, you're doing the
10 right thing, or you need to do more, or
11 something like that?

12 MR. BUDRIS: Well, yes, we do, your Honor.
13 And that's the second part of this allegation,
14 which is that it's Casella personnel that are
15 responsible for preparing these water quality
16 monitoring reports, which is the predominant
17 form of the oversight of this drainage channel.
18 It's Casella personnel that are working to
19 prepare these reports. It's Casella personnel
20 that are representing what's in these reports.

21 THE COURT: Let's see if we can find -- do
22 you have the actual language of the person
23 liability provision of the Clean Water Act?
24 What does it actually say?

25 MR. BUDRIS: I do not have that statutory

1 section in front of me.

2 THE COURT: Maybe my clerk -- do you know,
3 in these materials, do we have that section that
4 I -- I did not ask you to pull it together for
5 me, so you might not have it.

6 LAW CLERK: I'm not sure.

7 THE COURT: Okay. Maybe if you could run
8 upstairs and see if you could find the volume
9 that has the -- I assume there's a statutory
10 provision that says "person," and then I don't
11 know if there's a definition of "person." If
12 there is, if you could pull the volume that has
13 both of those and just bring them down to me.

14 Are there cases that specifically say that
15 and that alone, what you described, that is,
16 overseeing monitoring and communicating with
17 environmental regulators is sufficient to make
18 you a liable person if the owner dredges a
19 channel and starts putting bad stuff into the
20 river?

21 MR. BUDRIS: Well, your Honor, there are
22 cases which we've cited in our briefs that speak
23 to this specifically with respect to the Clean
24 Water Act and also RCRA.

25 I would point the court first to the

1 Citizens Coal Council, the Emerald Coal
2 Resources case from the Western District of
3 Pennsylvania. And in that case, plaintiffs
4 allege in the complaint that the parent's
5 employees communicated with Pennsylvania DEP
6 regarding environmental compliance and
7 permitting at the facility, and the court held
8 that that was sufficient to tie the parent in
9 for Clean Water Act liability.

10 THE COURT: What's the name of that case
11 again?

12 MR. BUDRIS: It's Citizens Coal Council,
13 the Emerald Coal Resources.

14 THE COURT: Okay. I don't know that I
15 have actually read that one. Do you have a copy
16 of it?

17 MR. BUDRIS: I do not have a copy of it,
18 your Honor. I'd be happy to provide you with
19 the cite if you'd like it.

20 THE COURT: Well, I'm already running my
21 poor clerk up and down the stairs.

22 So the cases that I found most help speak
23 of it sort of this way. The ability to control
24 the facility coupled with knowledge of the
25 violation could be sufficient to make someone a

1 liable person. So even though you're not the
2 technical owner, if you control -- I've seen
3 cases that suggested liability on both the party
4 who actually performed the work and the party
5 with responsibility or control over performance.
6 That's what I have been thinking about in terms
7 of liability that isn't veil-piercing liability.

8 The Clean Water Act at Section 1362(5)
9 defines a person to include individuals and
10 corporation, and it imposes liability on -- only
11 on persons that either perform the work or had
12 responsibility for or control over the
13 performance of the work. That's the way -- the
14 standard that I've been inclined to look at is
15 either you perform the work or have
16 responsibility for or control over, and not
17 sufficiently you allege the violation of that
18 standard.

19 MR. BUDRIS: Well, your Honor,
20 respectfully, plaintiffs disagree in stating
21 that, you know, Casella personnel are
22 responsible for the water quality monitoring
23 here. And we're not saying that it's Casella
24 that's responsible. It's not that vague an
25 allegation. It's actual Casella staff are

1 performing this work on behalf of the landfill.
2 I believe that does satisfy that standard.

3 THE COURT: Well -- so which plaintiff do
4 you represent?

5 MR. BUDRIS: I represent both Toxics
6 Action and CLF.

7 THE COURT: So suppose that the defendant
8 engaged in a contract with CLF to have CLF
9 communicate with the authorities and monitor
10 what's going on at the site, and yet there were
11 still violations. Could CLF be sued as a person
12 under the Clean Water Act?

13 MR. BUDRIS: Well, your Honor, I highly
14 doubt that CLF would enter into that contract.
15 But --

16 THE COURT: Well, CLF does all kinds of
17 stuff. I mean, I had a case with them involving
18 the Portsmouth -- the Portsmouth wastewater
19 discharge facility where they're very supportive
20 and engaged with the efforts to do what the City
21 of Portsmouth wants to do. And they're really
22 engaged in monitoring stuff all the time. I
23 could see them well being, as a part of a
24 consent decree, assuming the power to monitor
25 and report and engage in dialogue with.

1 MR. BUDRIS: And your Honor, if CLF as a
2 third party, or any other third party, were
3 taking on the responsibility to perform this
4 work and were actually performing the work, then
5 that would satisfy that Clean Water Act
6 standard. They would be operating this
7 discharge channel alongside NCES, which is what
8 Casella is doing here. They are both taking on
9 responsibility for the operation of the drainage
10 channel and the monitoring of the drainage
11 channel here.

12 THE COURT: Okay. I mean, I think this is
13 your most strained argument, and -- but what you
14 really are saying is, in terms of specific
15 actions, you're saying they receive and they --
16 they conduct the monitoring. Are you saying
17 that they contract with the environmental firm
18 that's doing the monitoring? Is it a contract
19 with Casella or is it a contract with the sub?

20 MR. BUDRIS: We at this point, having not
21 gotten to discovery yet, we are not sure who the
22 contract is with, but we know that Casella
23 personnel are listed as the responsible parties
24 on those ultimate water quality monitoring
25 reports that are submitted. So that's enough,

1 again, at this 12(b)(6) stage to get us to
2 discovery on this issue. It's a plausible
3 allegation that Casella personnel are doing the
4 work here.

5 THE COURT: Okay. Let me hear your
6 response.

7 MS. ARROYO: Your Honor, I think what's
8 important to -- I just want to direct us back to
9 the actual language of the complaint.

10 One of the allegations is that Casella
11 personnel -- this is in paragraph 20 -- also
12 worked with third-party contractors and
13 consultants to prepare the water quality
14 monitoring results. It's not an allegation that
15 they're doing it. And, really, that's what the
16 standard here is. It's who is doing the work.

17 And Attorney Budris mentioned one of the
18 cases cited in his papers, but the other one
19 is the Best Foods case, which says the question
20 is not whether the parent operates a subsidiary
21 but rather whether it operates the facility, and
22 that operation is evidenced by participation in
23 the activities of the facility, not the
24 subsidiary.

25 The complaint doesn't allege activities at

1 the facility, at the landfill. What it does is
2 allege that Casella owns the parcel, is a
3 permittee under the current regulated
4 activities. There is no allegation of control
5 over daily policy, policy decisions, business
6 practices, are we going to put cover on today or
7 are we going to put cover on tomorrow. Those
8 aren't the questions that Casella has any
9 involvement in. Instead, as you suggested in
10 your conversation with Attorney Budris, it's a
11 parent-subsidary relationship: checking boxes,
12 keeping an eye on reporting, and making sure
13 that everything is being --

14 THE COURT: The parents of wholly owned
15 subsidiaries have all kinds of interest in the
16 activities of their subsidiary, and that they
17 maintain an interest in the activities of their
18 subsidiary won't support liability under a
19 veil-piercing theory unless more than mere
20 interest -- tell me what you're doing, give me
21 reports of what your potential liabilities are,
22 or -- and it wouldn't support veil-piercing
23 liability even if the parent were contacting the
24 DES or said to the subsidiary, "We want to be
25 the sole point of contact." I don't think that

1 would make them liable under a veil-piercing
2 theory, nor do I think that alone, being the
3 contact point, is sufficient, it seems to me, to
4 make them liable.

5 I am sympathetic to the argument that the
6 plaintiff is making that they have not yet
7 engaged in discovery. And certainly since the
8 rest of the case is going to proceed against the
9 subsidiary, one possible way of dealing with
10 that is to say you really haven't gathered
11 sufficient information to allege a plausible
12 claim.

13 And, therefore, I grant the motion to
14 dismiss but without prejudice to your right to
15 seek to add them back if you acquire information
16 in discovery that demonstrates that their
17 involvement is more than just a communicator --
18 collector and communicator of information, which
19 is, although they make kind of more general
20 manage and so forth, those statements seem to be
21 conclusory at this point and are the kind of
22 statements that I should probably disregard
23 under the Iqbal Twombly standard and look to
24 more of the underlying facts which look more at
25 this point like the parent collects information

1 that the subsidiary produces through contractors
2 or something else, and communicates and engages
3 in discussions with, which, you know -- so one
4 answer is to dismiss this without prejudice and
5 let them come in and bring Casella back in if
6 necessary.

7 What else did you want to say?

8 MS. ARROYO: Well, just -- you beat me to
9 it. I had a note as well that conclusory is a
10 standard here, because -- and, you know, your
11 Honor, you have reiterated several times today
12 the standard for a motion to dismiss, and it's
13 what's in the complaint. And what's in the
14 complaint, regardless of what may be discovered
15 in discovery, what's in the complaint is
16 insufficient to rise to that standard of whether
17 Casella is just as liable to the extent NCES is
18 liable. I don't think that the kitchen sink
19 should go forward at this point, based on what's
20 in the complaint.

21 THE COURT: Okay. So there is this
22 allegation about funding the landfill's
23 operation. I mean, if they were actually
24 providing funds directly to pay for the
25 operation of the landfill, that might also be

1 different.

2 Do you have anything to say about that?

3 MS. ARROYO: Well, I think here it doesn't
4 sound like there's any dispute that NCES is the
5 owner and it's also the operator of its own
6 facility. So it's due -- the reporting is done
7 by its consultant, Sam Moorhead. The funding
8 alone doesn't seem necessary to give rise to
9 that involvement at the facility to its
10 day-to-day operations.

11 THE COURT: It would depend. If they
12 loaned money to the company to pay -- the
13 subsidiary to pay for it, that wouldn't make
14 them a person liable. If they're just running
15 the whole thing, paying the contractors, doing
16 all of that, and there isn't any agreement about
17 how -- I mean, I say a loan agreement where a
18 sub says, "I need a million dollars to do this."
19 The parent says, "Okay, we'll loan you a million
20 dollars. Here's the note. Here's the" -- but
21 we just don't know at this point what this
22 so-called funding is or what the basis for the
23 allegation about funding is.

24 MS. ARROYO: Well, the allegation for a
25 motion to dismiss should be more than funding.

1 Because I agree: I think giving a check for one
2 thing is very different than saying, "Parent
3 company, I'd like money for this particular
4 project," and then the parent company guiding
5 the implementation of that proposed policy, for
6 example.

7 So, again, the basis of the complaint here
8 is really limited to paragraph 20. It's a
9 fairly scant allegation. It seems insufficient
10 based on the standard for motion to dismiss.

11 THE COURT: All right. Thank you.

12 Let me just hear your response to this.
13 How are you going to be harmed if I dismiss
14 without prejudice Casella? Is it going to
15 affect your ability to get discovery? Is it
16 going to affect your ability to proceed with the
17 case? If you get the contracts with the
18 environmental consultants and their contracts
19 with Casella, if you have contracts for the
20 removal of the soil and their Casella contracts,
21 obviously you'll have a different argument to
22 present. But just telling me, well, factually
23 what we know is that they communicated with DES
24 and they were communicating with the company's
25 monitoring facility, that doesn't seem to be all

1 that sufficient.

2 MR. BUDRIS: Well, your Honor, as to the
3 prejudice to plaintiffs, you know, the issue
4 here is Casella personnel, whether Casella is
5 involved. And if Casella is no longer in the
6 case, we won't be able to take discovery from
7 Casella itself on that.

8 So to the extent that the --

9 THE COURT: I don't think that's true.
10 Are you going to tell me you'll resist discovery
11 if you're out of the case?

12 MS. ARROYO: (Shaking head.)

13 THE COURT: They're saying no, and I'm
14 going to hold them to that promise. So I don't
15 think that it will affect your ability to do
16 discovery in any way.

17 MR. BUDRIS: That -- Casella's counsel
18 having said that here gives us some level of
19 comfort. But I would like to point out one
20 more -- two more things in rebuttal to what
21 Attorney Arroyo said, first as to the issue of
22 plaintiffs not alleging that Casella is
23 operating the facility as a whole.

24 Well, there's a specific reason we didn't
25 do that, because this case isn't about the

1 facility as a whole. This case, again, its
2 focus is about the drainage. So we allege the
3 ways in which Casella personnel are involved in
4 the drainage channel.

5 And the second point ties in there
6 because, again, we didn't allege that Casella
7 personnel are overseeing the water quality
8 monitoring reports or receiving communication
9 about them. We are saying they are working with
10 third-party contractors and consultants to
11 prepare water quality monitoring results. We
12 are alleging that they are involved in the
13 preparation. They're not just catching wind of
14 the water quality monitoring reports. They're
15 not receiving them and putting a rubber stamp on
16 them and saying, "Okay. This is great. Our
17 subsidiary is doing well." They are working on
18 the ground with those consultants and
19 contractors to prep that monitoring, which is a
20 key part of what's going on here with the
21 drainage channel.

22 THE COURT: All right. Thank you.

23 So it's a very close call. I have to say,
24 looking at the 12(b)(6) standard, there are two
25 ways I could do this. I could deny the motion

1 without prejudice and allow for a limited
2 expedited discovery on the specific role that
3 Casella plays, or I could grant the motion and
4 dismiss without prejudice and allow for
5 discovery and you can bring them back in. I
6 wouldn't want to throw Casella out here without
7 allowing for some additional information to be
8 collected. And so I think it's a close case.

9 What I'm suggesting to you is that it is
10 very slim but minimally sufficient to survive a
11 12(b)(6) motion, but I want in your discovery
12 plan the parties to agree to expedited discovery
13 on Casella's specific involvement. If you can
14 show you didn't -- weren't involved in
15 dredging -- because they allege you and/or the
16 sub did the remediation work. You and/or the
17 sub did this. They make these allegations about
18 the parent managing. And, you know, it's
19 debatable whether those are conclusory and
20 should be disregarded or not.

21 But what I'm telling you both is that if
22 at the end of the day all that you have is, you
23 have a sub who entered into contracts with
24 environmental consultants, a sub who did the
25 removal project, a sub who reported information

1 to a parent, a parent who sent its own people to
2 the meetings and talked about what was going on,
3 had their own people communicate with DES, and
4 that's what all you have; but the sub did the
5 excavation, the sub manages the entire facility,
6 including this aspect of the project, and that
7 the only involvement with the parent is they
8 communicated with, they received results, they
9 gave general guidance to the sub, I would expect
10 you to agree to the dismissal of the parent so
11 that we don't have further litigation. And if
12 after expedited discovery you want to renew your
13 motion, I explained to you at least what my
14 moderately informed view is about the standard.
15 It requires more than what is concretely and
16 specifically alleged here, that is, overseeing
17 monitoring and in communicating with. It's
18 going to require more than that, some kind of
19 active engagement. And without that evidence, I
20 expect you to agree to the dismissal of the
21 parent.

22 In any event, since the defendant is
23 cooperative on this, as it should be, because
24 they would get discovery of the parent's people
25 anyways, I don't see how you really benefit from

1 this unless you have a strong argument that
2 they're actually involved.

3 So please don't waste my time or their
4 time and make them file another motion to
5 dismiss. Conduct what discovery you need to to
6 make a relatively expedited determination about
7 the parent's liability. And I hope you'll do
8 the right thing if you can uncover more evidence
9 than the kind that I think is insufficient, or
10 you can come forward with a clearer briefing of
11 the law to explain to me that my preliminary
12 assessment of what's required is insufficient.

13 So -- okay. So I'm going to deny the
14 motion without prejudice on that ground, direct
15 that the parties build into their discovery plan
16 some expedited discovery, and require the
17 parties after that discovery is completed to
18 meet and confer and attempt to agree on a
19 agreed-upon disposition in the claim against the
20 parent. Right? That's really not what's
21 driving the case. We ought to -- you know, I
22 hope you can not get too distracted with that
23 and we can focus on what really is the core of
24 the case, and that is what did go on with that
25 alleged drainage channel or not. Because I can

1 see fact patterns where there's no NPDES permit
2 required and I can see fact patterns where it
3 is, and I think we just need to know more about
4 the case.

5 So to the extent you have this good
6 argument that you haven't done anything more
7 with Casella than what's been described, and you
8 can cooperate with them and produce actual
9 documents and let them interview the person
10 who's most knowledgeable or depose them and that
11 can get rid of it, that might be a way to get
12 rid of that part of the case relatively quickly.
13 All right?

14 So, bottom line summary, the motion to
15 dismiss for lack of standing is denied for the
16 reasons I specified. The motion to dismiss for
17 failure to state a claim that this is a point
18 source discharge is denied. The motion to
19 dismiss for failure to state a claim that
20 Casella is liable as a person under the Clean
21 Water Act is denied without prejudice.

22 The parties should conduct additional
23 discovery on that issue on an expedited basis
24 and at the completion meet and confer and
25 attempt to agree upon a disposition of that

1 particular matter. If a disposition can't be
2 agreed upon, the defendant is free to file a
3 further motion. It probably would be a very
4 brief focused motion for partial summary
5 judgment as to that defendant, which I don't
6 expect the plaintiff would oppose unless they
7 have a good-faith basis for doing so.

8 All right. Anything else we need to talk
9 about today?

10 MR. BUDRIS: No, your Honor.

11 MS. ARROYO: No, your Honor.

12 THE COURT: Okay. My thanks to the court
13 reporter, who I made you stay probably longer
14 than you're used to. But that's what happens
15 when you come to my courtroom.

16 Thank you.

17 (Conclusion of hearing 11:35 a.m.)
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C E R T I F I C A T E

I, Deanna J. Dean, LCR, RDR, CRR, do hereby
certify that the foregoing transcript is a true and
accurate transcription of the within proceedings,
to the best of my knowledge, skill, ability, and
belief.

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Deanna J. Dean, LCR, RDR, CRR

Licensed Court Reporter No. 87

Signed this 8th day of October, 2018